

FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-022

August 13, 2009

Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: *COMPANY Letter Ruling Request*

Dear Representative:

On behalf of our client COMPANY,¹ we hereby request a letter ruling regarding the sales tax treatment of the business transactions described below.

COMPANY is a wholesale company whose core business is to provide its customers carbon dioxide (both in liquid and gaseous form) ("CO₂") for use in beverage carbonation systems, commonly known as soda fountains. COMPANY's customers include restaurants, convenience stores, movie theaters, theme parks and sports venues.

I. BULK CO₂ TANK/HIGH PRESSURE CYLINDER RENTAL AND BULK LIQUID/GAS CO₂ SALES

COMPANY delivers liquid CO₂ to customers that is stored in a stainless steel cryogenic tank installed at the customer's premises ("Bulk CO₂ Tank") while gas CO₂ is delivered to customers in portable cast iron steel containers ("High Pressure Cylinder"). The customer connects the Bulk CO₂ Tank or the High Pressure Cylinder to its beverage carbonation machine (a soda fountain) where the liquid or gas CO₂ is mixed with water and soda syrup (obtained by the customer from a third party vendor) to produce a fountain soda.² COMPANY's customers sell fountain sodas to their patrons, each of whom pays sales tax, as appropriate, on his or her purchase of the fountain soda. When the liquid CO₂ in a Bulk CO₂ Tank or gas CO₂ in a High

¹ COMPANY is located at ADDRESS. COMPANY's EIN is ##### and its Utah sales tax account number is #####. This issue, as it regards COMPANY, is not presently under investigation or audit by the Utah State Tax Commission, nor is COMPANY presently pursuing any protest, litigation or negotiation on the issue with the Utah State Tax Commission. Please see the attached power of attorney authorizing COMPANY 2, including the undersigned, as COMPANY's representative.

² In some cases, the gas delivered to COMPANY's customers is a blend of CO₂ and nitrogen, or pure nitrogen. This gas is used to carbonate and propel beer through a tap system. Like a soda, COMPANY's customer sells a beer to its patron, each of whom pays sales tax, as appropriate, on his or her purchase of the beer.

Pressure Cylinder runs out, COMPANY refills it and continues to do so until the relationship terminates. Upon termination, the customer is obligated to return the Bulk CO₂ Tank or High Pressure Cylinder to COMPANY.

COMPANY therefore engages in two transactions with its customers. First, it rents the Bulk CO₂ Tanks and High Pressure Cylinders and second, it sells liquid and gas CO₂.³ We request a letter ruling that details Utah's sales tax treatment of the following:

- 1) Rental of the Bulk CO₂ Tanks and High Pressure Cylinders (which hold liquid and gas CO₂, respectively) to COMPANY's customers;
- 2) Sale of the liquid or gas CO₂ to COMPANY's customers;⁴
- 3) Whether the total invoiced amount is subject to Utah sales tax if the invoice does not separately state the rental charge and sales charge for the CO₂.

II. FEE, CHARGES AND SURCHARGES

In addition, a COMPANY customer may be charged the following fees, charges and surcharges: (a) delivery fees for delivering liquid CO₂ or High Pressure Cylinder containing gas; (b) energy/fuel surcharge; (c) hazardous materials fees (for handling hazardous materials and regulatory compliance); (d) Bulk CO₂ Tank inspection and/or permit fee (also for regulatory compliance; and (e) personal property tax charge⁵. We request a letter ruling that details Utah's sales tax treatment of the following:

- 4) Fees, charges and surcharges charged in connection with the rental of Bulk CO₂ Tanks and High Pressure Cylinders and the sale of liquid and gas CO₂.

Thank you very much for your time and consideration. Please feel free to contact us if you would like more information or have any questions.

Sincerely,

NAME

³ COMPANY provides its customers with a variety of purchasing plans. The Budget Plan allows COMPANY's customers to rent a Bulk CO₂ Tank together with an annual allotment of liquid CO₂ at a low flat monthly rate. Under this plan, the customer's invoice details only the flat monthly rate, rather than separately stating the charges for the Bulk CO₂ Tank and liquid CO₂ sale. COMPANY's other purchasing plans separately state the charges for Bulk CO₂ Tank rental and liquid CO₂ sale. Consequently, and as requested in paragraph (3), we would like you to rule whether the customers who choose the Budget Plan must pay sales tax on the entire invoiced amount because the invoice is not separately stated.

⁴ Please note that some COMPANY customers own their own Bulk CO₂ Tank. In those cases, COMPANY's only role is to sell the liquid CO₂ to the customer. Nonetheless, the liquid CO₂ is used as described above.

⁵ The personal property tax charge is an additional cost of providing the tank. COMPANY must pay the personal property tax charge on its ownership of the Bulk CO₂ Tanks. That charge is then passed on to the customer in the ordinary course of business together with a bundled tax preparation service charge imposed by COMPANY.

INITIALS
Enclosure(s)

cc: NAME 2 (w/encl.)
NAME 3 (w/encl.)

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RESPONSE LETTER

July 27, 2010

NAME
COMPANY 2
ADDRESS

RE: Private Letter Ruling Request—The Sales Tax Treatment of Transactions Involving CO₂, Nitrogen, and Related Storage Containers

Dear NAME:

You have requested a ruling on behalf of your client, COMPANY, about whether its various sales and rental transactions involving CO₂, nitrogen, and the related storage containers are subject to Utah sales and use tax.

Facts

In your request letter and through subsequent conversations, you explained that COMPANY sells CO₂ and nitrogen to restaurants, convenience stores, bars, etc. The CO₂ is used to carbonate soft drinks and to maintain the quality of beer. The nitrogen is used to propel beer through a tap system and also to maintain the quality of beer. COMPANY sells CO₂ in liquid and gas forms and sells nitrogen in gas form only. It delivers the liquid CO₂ to stainless steel cryogenic tanks installed at the customers' premises ("Tanks"), and it delivers the gas CO₂ and nitrogen to customers in portable cast iron steel containers ("Cylinders"). Sellers of soft drinks connect the Tanks or Cylinders containing CO₂ to their soda fountains where the CO₂ is mixed with water and syrup to produce the soft drinks. Sellers of beer use CO₂ and/or nitrogen to maintain the quality of the beer from when they purchase the beer to when they sell it to their patrons. Sellers of beer connect the Cylinders containing CO₂ and/or nitrogen to their dispensing systems to ensure that the beer maintains the correct concentration of CO₂ or nitrogen. Also, sellers of beer using larger dispensing system, such as those in stadiums, use nitrogen to propel the beer through the system. COMPANY's customers selling soft drinks or beer charge sales tax on the beverages and collect that tax from their patrons. When a customer of COMPANY runs out of CO₂ or nitrogen, COMPANY refills the Tank or Cylinder as long as the sales-purchasing relationship continues. When the relationship terminates, the customer is obligated to return the Tank or Cylinder to COMPANY.

You stated that COMPANY has two transactions with its customers. First, it rents the Tanks and/or Cylinders. Second, it sells the liquid CO₂, gas CO₂, or gas nitrogen. When a customer has its own Tank or Cylinder, COMPANY only sells the liquid CO₂, gas CO₂ or gas nitrogen to the customer.

You explained that COMPANY offers a Budget Plan, under which COMPANY rents a Tank together with an annual allotment of liquid CO₂ for a flat monthly fee. It invoices this fee to its customers without separately stating the charges for the Tank and the liquid CO₂. For the other plans, COMPANY separately states the charges for the Tank or Cylinder and the CO₂ or nitrogen.

You have also explained that COMPANY may charge its customers the following fees, charges, and surcharges:

- a. Delivery fees for delivering liquid CO₂ or a Cylinder containing gas
- b. Energy/fuel surcharges
- c. Hazardous materials fees (for handling hazardous materials and regulatory compliance)
- d. Tank inspection and/or permit fees (for regulatory compliance)
- e. Personal property charges (including the personal property tax that COMPANY pays and passes on to its customers and also a bundled tax preparation service charge that COMPANY imposes.)

Issues

You have requested that the ruling specifically cover the following:

1. *The sales tax treatment of the rental of the Bulk CO₂ Tanks and High Pressure Cylinders to COMPANY's customers*
2. *The sales tax treatment of the liquid or gas CO₂ to COMPANY's customers*
3. *Whether the total invoiced amount is subject to Utah sales tax if the invoice does not separately state the rental charge and the sales charge for the CO₂, as with the Budget Plan.*
4. *The sales tax treatment of the fees, charges, and surcharges charged in connection with the rental of Bulk CO₂ Tanks and High Pressure Cylinders and the sale of liquid and gas CO₂.*

Applicable Law

Utah Code § 59-12-103(1) imposes tax on the following:

- (a) retail sales of tangible personal property made within the state;
....

- (k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:
 - (i) stored;
 - (ii) used; or
 - (iii) otherwise consumed . . .

....

Utah Code § 59-12-102(111) defines “tangible personal property,” in pertinent part, as follows:

- (a) . . . "tangible personal property" means personal property that:
 - (i) may be:
 - (A) seen;
 - (B) weighed;
 - (C) measured;
 - (D) felt; or
 - (E) touched; or
 - (ii) is in any manner perceptible to the senses.
- (b) "Tangible personal property" includes:
 -
 - (iii) gas; [or]
 - (iv) steam . . .
 -

Utah Code § 59-12-104(25) provides the resale exemption, exempting the following:

a product purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product . . .

Utah Code § 59-12-104(22) provides an exemption for nonreturnable containers, exempting the following:

sales of nonreturnable containers, nonreturnable labels, nonreturnable bags, nonreturnable shipping cases, and nonreturnable casings to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property to be sold by that manufacturer, processor, wholesaler, or retailer . . .¹

Utah Code § 59-12-102(85) defines “purchase price,” in pertinent part, as follows:

- (b) "Purchase price" and "sales price" include:
 - (i) the seller's cost of the tangible personal property, a product transferred electronically, or services sold;

¹ Utah Admin. Code R865-19S-48 provides additional information on this exemption and is available at <http://tax.utah.gov/research/effective/r865-19s-048.doc>.

- (ii) expenses of the seller, including:
 -
 - (G) a tax imposed on the seller;
- (iii) a charge by the seller for any service necessary to complete the sale . . .
-
- (c) "Purchase price" and "sales price" do not include:
 -
 - (ii) the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser:
 -
 - (B) a delivery charge . . .
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Utah Code § 59-12-102(16)(a) defines “bundled transaction” as follows:

“Bundled transaction” means the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are:

- (i) distinct and identifiable; and
- (ii) sold for one nonitemized price.²

Utah Code § 59-12-102(16)(b)(i)-(vii) excludes certain transactions from the definition of bundled transactions. Section 59-12-102(16)(b)(vi) excludes a transaction with a taxable, *de minimis* item, providing as follows:

“Bundled transaction” does not include:

-
- (vi) a transaction that includes tangible personal property or a product subject to taxation under this chapter and tangible personal property or a product that is not subject to taxation under this chapter if the:
 - (A) seller's purchase price of the tangible personal property or product subject to taxation under this chapter is *de minimis*; or
 - (B) seller's sales price of the tangible personal property or product subject to taxation under this chapter is *de minimis* . . .

Utah Code § 59-12-102(16)(e)(i) defines *de minimis* as follows:

For purposes of Subsection (16)(b)(vi), the sales price of tangible personal property or a product subject to taxation under this chapter is *de minimis* if:

- (A) the seller's purchase price of the tangible personal property or product is 10% or less of the seller's total purchase price of the bundled transaction; or
- (B) the seller's sales price of the tangible personal property or product is 10% or less of the seller's total sales price of the bundled transaction.

² Utah Code § 59-12-102(16)(d) further defines “sold for one nonitemized price.” We have not reprinted that statute here because the definition is not at issue for this ruling.

Utah Code § 59-12-103(2)(d)(ii)-(iii) prescribes how non-food, bundled transactions are taxed, as follows:

- (ii) Subject to Subsection (2)(d)(iii), for a bundled transaction other than a bundled transaction described in Subsection (2)(d)(i):
 - (A) if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation under this chapter unless:
 - (I) the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation under this chapter from the books and records the seller keeps in the seller's regular course of business; or
 - (II) state or federal law provides otherwise; or
-
- (iii) For purposes of Subsection (2)(d)(ii), books and records that a seller keeps in the seller's regular course of business includes books and records the seller keeps in the regular course of business for nontax purposes.

Analysis

Because you have asked for a ruling covering four specific areas, the Commission will respond to each separately:

1. *The sales tax treatment of the rental of the Tanks and Cylinders to COMPANY's customers*

Under § 59-12-103(1)(k), the leases and rentals of tangible personal property are taxable unless an exemption applies. Although there is an exemption in § 59-12-104(22) for nonreturnable containers, this exemption does not apply because the Tanks and Cylinders are returnable upon the termination of the lease or rental contract.

2. *The sales tax treatment of the liquid or gas CO₂ to COMPANY's customers*

Under § 59-12-102(111), the CO₂ is tangible personal property, regardless of whether it is in liquid or gas form. Likewise, nitrogen is tangible personal property, also. Furthermore, COMPANY's sales of CO₂ and nitrogen are subject to sales and use tax under § 59-12-103(1)(a) unless an exemption applies.

Under § 59-12-104(25), the resale exemption may apply only if an item is an ingredient or component part of a product being sold. The CO₂ that is used to carbonate soft drinks becomes an ingredient of the soft drink sold. Thus, the resale exemption may apply and COMPANY may sell the CO₂ as exempt transactions to customers making soft drinks if COMPANY obtains valid resale exemption certificates from them.

The CO₂ and nitrogen that are used to maintain the quality of beer do not become an ingredient of the beer sold. Rather, the sellers of beer instead use the CO₂ and nitrogen to keep the beer at the same quality as when the beer was originally purchased and to dispense the beer. Thus, the resale exemption does not apply to such sellers, and COMPANY must charge sales tax on these sales.

3. *Whether the total invoiced amount is subject to Utah sales tax if the invoice does not separately state the rental charge and the sales charge for the CO₂, as with the Budget Plan.*

In this situation, the Budget Plan, which includes the sale of the CO₂ and the rental of the Tank for one nonitemized price, is a bundled transaction under § 59-12-102(16)(a) unless one of the exceptions found in § 59-12-102(16)(b)(i)-(vii) applies.

Based on the facts, we believe the *de minimis* exception found in § 59-12-102(16)(b)(vi) might apply to sales of CO₂ for soft drinks; however, there are insufficient facts to make a definite conclusion. Under the *de minimis* exception, the nontaxable item would be the CO₂ that qualifies for the resale exemption and the taxable item would be the rental of the Tank. The exception provides that if the taxable item (the rental of the Tank) is *de minimis* then the transaction is not a bundled transaction. To determine whether an item is *de minimis*, one must apply the provisions of § 59-12-102(16)(e). If you think that the rental of the Tank might be *de minimis*, we recommend that you review the provisions of § 59-12-102(16)(e) and contact us if you have additional questions.

We will now continue our analysis based on the assumption that none of the exceptions of § 59-12-102(16)(b)(i)-(vii) apply, so the sale is a bundled transaction. Under § 59-12-103(2)(d)(ii)(A)-(A)(I), the entire bundled transaction is subject to sales and use tax unless COMPANY can identify by reasonable and verifiable standards that an item in the bundled transaction is not subject to taxation, i.e. the CO₂ for soft drinks, meeting the resale exemption. If COMPANY can meet the requirements of § 59-12-103(d)(ii)(A)(I), then it would charge and collect sales tax only on the taxable portion of the bundled transaction, i.e. on the rental of the Tank.

For the combined rental of a container and the sale of CO₂ or nitrogen to be used to maintain beer, the total invoiced amount is subject to tax because each individual component is subject to tax, as discussed previously.

Finally, we note that COMPANY must follow § 59-12-107(2)(c)(i), under which it must give its customer a receipt for the tax collected or it must bill the tax as a separate item on the invoice.

4. *The sales tax treatment of the fees, charges, and surcharges charged in connection with the rental of Bulk CO₂ Tanks and High Pressure Cylinders and the sale of liquid and gas CO₂.*

Delivery fees and energy/fuel surcharges. Both the delivery fees and energy/fuel surcharges appear to be delivery charges under § 59-12-102(85)(c)(ii)(B). This means that they are excluded from the definition of purchase price if they are “separately stated on an invoice, bill of sale, or similar document provided to the purchaser.” Therefore, if the charges are separately stated, they are not subject to sales and use tax. However, if they are not separately stated, then are they part of the purchase price, as “a charge necessary to complete the sale” under § 59-12-102(85)(b)(iii), and they would be subject to sales and use tax if the item to which they relate is also subject to sales and use tax.

Hazardous materials fees and tank inspection and/or permit fees. The hazardous materials fees and the inspection fees are expenses passed on by COMPANY to its customers. These expenses are necessary to complete the sales of CO₂ or the rentals of the Tanks and Cylinders. Under § 59-12-102(85)(b)(iii), such fees are part of the purchase price of the sales of CO₂ or the rentals of the Tanks or Cylinders. If the fees are for taxable rental or sale transactions, then the fees are also taxable. Therefore, the tank inspection fees are taxable because they are for taxable rentals of Tanks or Cylinders. Alternatively, if the fees are for exempt transactions, then the fees are also exempt. Thus, the hazardous materials fees are exempt if they are for exempt sales of CO₂ for soft drinks.

Personal property charges. The personal property tax charges are for taxes imposed on the lessor, COMPANY. Under § 59-12-102(85)(b)(ii)(G), such expenses are included in the definition of purchase price. Because the personal property charges relate to the taxable rentals of the Tanks and Cylinders, the personal property charges are also taxable.

Conclusion

Based on the above analysis, we make the following conclusions:

- The rentals of the Tanks and Cylinders are subject to sales and use tax.
- The sales of CO₂ for soft drinks are exempt under the resale exemption if COMPANY receives valid resale exemption certificates from its customers.
- The sales of CO₂ and nitrogen for maintaining the quality of beer and for dispensing the beer are taxable.
- The Budget Plan is taxable as a bundled transaction. Assuming the *de minimis* exception does not apply, the entire bundled transaction is subject to sales and use tax unless COMPANY can identify by reasonable and verifiable standards that a product is not subject to taxation, i.e. the CO₂ for soft drinks, meeting the resale exemption.
- The delivery and energy/fuel surcharges are nontaxable delivery charges, if they are separately stated on the invoice or bill. Otherwise, they are included in the purchase price of the item to which they relate, and if that item is taxable, then the surcharges are also taxable.

- The hazardous materials and inspection fees are taxable if they relate to a taxable transaction and exempt if they relate to an exempt transaction.
- The personal property tax charges are taxable as part of the purchase prices of the rentals of the Tanks and Cylinders.

Our conclusions are based on the facts as described and the Utah law currently in effect. Should the facts be different or if the law were to change, a different conclusion may be warranted. If you feel the Commission has misunderstood the facts as you presented them, you have additional facts that may be relevant, or you have questions, please feel free to contact the Commission.

For the Commission,

D'Arcy Dixon Pignanelli
Commissioner

DDP/aln
09-022